

NOV - 6 2006

FEDERAL ELECTION COMMISSION
SECRETARIAT

BEFORE THE FEDERAL ELECTION COMMISSION

2006 NOV -6 P 1:07

In the Matter of

Texans for Henry Cuellar Congressional Campaign)
And Rosendo Carranco)
in his official capacity as treasurer)

MUR 5422

MUR 5680

SENSITIVE

MUR 5422: GENERAL COUNSEL'S REPORT # 3

MUR 5680: GENERAL COUNSEL'S REPORT # 2

I. ACTIONS RECOMMENDED

MUR 5422: Find probable cause to believe that Texans for Henry Cuellar Congressional Campaign and Rosendo Carranco, in his official capacity as treasurer, ("the Committee") violated 2 U.S.C. § 434(b) and 11 C.F.R. § 104.3(d) in failing to file a Schedule C-1 to disclose information on a bank loan and loan restructuring

MUR 5680: Find probable cause to believe that the Committee violated 2 U.S.C. § 434(b)(4) by failing to disclose disbursements

II. BACKGROUND

Henry Cuellar was a candidate for Texas's 28th District seat in the United States House of Representatives in 2004. Texans for Henry Cuellar Congressional Campaign was the authorized committee for his campaign. Rosendo Carranco was treasurer of the Committee at all relevant times in 2004.

The Federal Election Commission ("Commission") previously found reason to believe that the Committee violated various reporting requirements arising under the Federal Election

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1 Campaign Act ("FECA" or "the Act") and its implementing regulations in MURs 5422 and
2 5680. In MUR 5422, the Commission found reason to believe that the Committee violated 2
3 U.S.C. § 434(b) and 11 C.F.R. § 104.3(d) by failing to timely and accurately file a Schedule C-1
4 with its 12-Day Pre-Primary disclosure report disclosing information about a \$200,000 bank
5 loan. In MUR 5680, the Commission found reason to believe the Committee violated 2 U.S.C.
6 § 434(b)(4) by failing to disclose a \$100,000 disbursement.

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9 Respondents were served with a General Counsel's Brief ("GC Brief"), which is incorporated
10 herein by reference. The response to the GC Brief does not contest any of the underlying facts.
11 Instead, the Committee asserts that the applicable regulations requiring the filing of the Schedule
12 C-1 are invalid; argues that it made "best efforts" to report the bank loan; and initiated self-
13 correction as to the \$100,000 disbursement. As demonstrated below, each of these arguments
14 lacks merit.

15 **III. MUR 5422**

16 **A. Factual Summary**

17 On February 26, 2004, the Committee filed its 12-Day Pre-Primary Report Schedule C
18 stating that on February 3, 2004 it had obtained an unsecured \$200,000 loan from the
19 International Bank of Commerce of Laredo, Texas. The next day, the Committee amended its
20 Pre-Primary Report's Schedule C to disclose that the loan was, in fact, secured. However, the
21 Committee did not file a Schedule C-1 disclosing detailed information about the loan in either
22 the original Pre-Primary Report or the amendment. 11 C.F.R. § 104.3(d).

1 On March 5, 2004 a complaint was filed suggesting that the absence of the information
2 required by the Schedule C-1, such as the description and value of collateral, the repayment
3 schedule, and a certification from the bank, raised questions about the loan's compliance with
4 FECA. On March 16, 2004, independent of the complaint, the Commission's Reports Analysis
5 Division ("RAD") sent a request for additional information ("RFAI") to the Committee inquiring
6 about the missing Schedule C-1, requesting a response by April 15, 2004. The Committee did
7 not respond to the RFAI during the 30-day response period.

8 Two months after it was due, on April 27, 2004, the Committee filed an unsigned
9 Schedule C-1 electronically, and on May 10, 2004, the Committee filed a signed paper copy of
10 the Schedule C-1. The C-1 disclosed that the loan was due August 3, 2004, rather than the
11 previously reported November 30, 2004. Otherwise the information provided on the Schedule C-
12 1 indicated that the loan was secured and made on terms that appear to have been in the ordinary
13 course of business.¹

14 The Committee continued to report the balance on the bank loan in subsequent reports,
15 including its October 2004 Quarterly Report. On January 12, 2005 the Committee filed a
16 Schedule C-1 reporting that the loan had been restructured on August 3, 2004. The Committee
17 should have reported this on a Schedule C-1 with the report due in the 2004 October Quarterly,
18 but failed to do so.

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¹ During the period the RFAI was pending, Mr. Cuellar was engaged in a recount concerning his election. Mr. Cuellar challenged incumbent Ciro Rodriguez in the March 9, 2004 Democratic Primary, and lost by 145 votes. Mr. Cuellar asked for a recount on March 23 and two recounts occurred: an initial recount on April 1 and a second recount on May 7, 2004. During this time Mr. Rodriguez filed a lawsuit challenging the recount, but on May 12, 2004, a court ruled that after Cuellar had won both recounts, he was the Democratic nominee. Mr. Rodriguez appealed but finally conceded defeat on August 13, 2004.

B. The Committee Failed To Timely File Schedule C-1 Forms

A loan to a political committee or to a candidate acting as an agent of the committee must be reported pursuant to section 434(b). 2 U.S.C. § 434(b)(3)(E); 11 C.F.R. 104.3(a)(4)(iv). A committee that receives a loan from a bank must also file a Schedule C-1 with its first report due after a new loan or line of credit has been established.² 11 C.F.R. § 104.3(d)(1). Since a Schedule C-1 has special signature requirements, a committee filing its disclosure reports electronically must file the Schedule C-1 as a paper copy with its electronic submission, or as a digitized version in a separate file in the electronic submission, by the close of business on the prescribed filing date. 11 C.F.R. § 104.18(h)(2). Committees must file a new Schedule C-1 each time a loan is restructured to change the terms of the payment. 11 C.F.R. § 104.3(d)(3).

Respondents do not contest the underlying facts establishing that the Committee failed to timely file a Schedule C-1 with its Pre-Primary Report to report the loan in detail or that it failed to timely file a Schedule C-1 with its October Quarterly to report the loan restructuring, but instead argue that the loan information that it failed to disclose, such as how the loan was collateralized, was not information that is explicitly required by statute to be disclosed. Reply Brief at 3. Respondents contend that they were in full compliance with the statutory provisions,

² Schedule C-1 requires that the following information be disclosed: (1) the date and amount of the loan or line of credit, (2) the interest rate and repayment schedule for the loan, or each draw on the line of credit; (3) the types and value of traditional collateral or other sources of repayment securing the loan or line of credit and whether that security interest is perfected; and (4) an explanation of the basis of the credit established if the bases in (3) are not applicable. 11 C.F.R. § 104.3(d)(1)(i)-(iv). The committee treasurer must sign the schedule on Line G and attach a copy of the loan agreement. 11 C.F.R. § 104.3(d)(2). The lending institution must sign the statement on Line I, attesting that: the terms of the loan and other information regarding the extension of the loan are accurate, the terms and condition of the loan are no more favorable than those extended to similarly situated borrowers, the lending institution is aware that the loan must be made on a basis which assures repayment, and that in making the loan it has complied with the regulations set forth at 11 C.F.R. §§ 100.142(a)-(d).

1 and that violations of the regulations that add burdens and obligations beyond what the statute
2 requires do not amount to a violation of the Act. *See id.*

3 Congress has vested the FEC with primary and substantial responsibility for
4 administering and enforcing FECA and provided the Commission with extensive rulemaking and
5 adjudicative powers. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 21, 37
6 (1981). In the Act, Congress delegated authority to the Commission to “develop a filing, coding,
7 and cross-indexing system consistent with the purposes of [FECA];” and to “prescribe rules,
8 regulations, and forms to carry out the provisions of [FECA], in accordance with the provisions
9 of subsection (d) of this section [the procedure for rulemaking].” 2 U.S.C. § 438 a(1)(3) & a(8).
10 Further, Congress has the opportunity to reject any regulation within 30 legislative days.
11 2 U.S.C. § 438(d). The Commission’s implementation of 2 U.S.C. § 434(b) therefore carries the
12 force of law, *see United States v. Mead Corp.*, 533 U.S. 218 (2001) (finding agency
13 implementation of statutory authority qualifies for deference where Congress delegated authority
14 to the agency generally to make rules carrying the force of law); *see also Weber v. Heaney*, 793
15 F. Supp. 1438 (D. Minn.1992), *aff’d* 995 F.2d 872 (holding the regulations promulgated by the
16 Commission to implement the preemption provision of FECA had the force of law where the
17 preemption provision was ambiguous), unless arbitrary, capricious, or manifestly contrary to the
18 statute. *ABF Freight Systems v. National Labor Relations Board*, 510 U.S. 317 (1994).

19 The information required in Schedule C-1 is not arbitrary, capricious, or manifestly
20 contrary to the statute. As explained in the Explanation and Justification, the required
21 information is “the minimum amount of information necessary to provide adequate disclosure for
22 monitoring purposes.” Explanation and Justification, 56 Fed. Reg. 67118, 67122 (December 27,

1 1991). Both the Commission and the courts rely on this information in assessing whether a bank
2 loan was made in the ordinary course of business or was a violation of the Act.³ Accordingly, the
3 Commission has the authority to require public reporting of such information.

4 Respondent also argues that the Schedule C-1 requirement of paper filing was manifestly
5 contrary to the Act's exclusive electronic filing requirements in 2 U.S.C. § 434(a)(11)(A) &
6 (11)(C). See Reply Brief at 3. Part of section (11)(C) states, "[i]n promulgating a regulation
7 under this paragraph, the Commission shall provide methods (other than requiring a signature on
8 the document being filed) for verifying designations, statements, and reports covered by the
9 regulation." 2 U.S.C. § 434(a)(11)(C). The Committee, of course, failed to file a timely
10 Schedule C-1 either electronically or on paper – indeed its electronic filing was two months late.
11 Moreover, the Commission's regulations provide for the electronic filing of documents that have
12 special signatory requirements, such as a Schedule C-1, as a digitized separate file. 11 C.F.R.
13 § 104.18(h)(2); see Explanation and Justification, 65 Fed. Reg. 38415, 38424. (June 20, 2001)
14 (allowing for the filing of the Schedule C-1 as a "digitized version submitted as a separate file in
15 the electronic submission."). Respondents did not file the Schedule C-1, electronically or
16 otherwise, in their 12-day Pre-Primary Report or the October Quarterly.

17 The Committee further argues that its filing failure can be attributed to problems caused
18 by the Commission's Electronic Filing Office ("EFO"). Specifically, the Committee contends
19 that, following the Commission's implementation of an electronic filing software update, the
20 EFO had not upgraded a "testing filing" site with the new software, causing the Committee's

³ See *FEC v. Ted Haley Congressional Committee*, 852 F.2d 1111 (9th Cir. 1988) (using information such as the reporting of the loan guarantees and the loan's rapid repayment to decide there should be no civil penalties).

1 electronic filing vendor to unwittingly continue using out-of-date software. Had the test site been
2 updated, the Committee asserts that its vendor would have been reminded that a Schedule C-1
3 was necessary. The Committee contends that in the absence of such a reminder, it used its "best
4 efforts" to comply. *See Reply Brief*, at 3. This argument is without merit.

5 Independent of the purported EFO test filing issues,⁴ the Committee received notices of
6 the filing requirements from RAD and still failed to file the schedule, demonstrating that it failed
7 to exercise best efforts. For instance, the Committee failed to reply to the March 16, 2004
8 Commission RFAI within the requested 30-day period, and its unsigned electronic filing was
9 submitted 12 days *after* the RFAI response date of April 15, 2004. At that point it was well
10 aware of its filing obligations. Additionally, the Committee failed to timely file a Schedule C-1
11 to report the restructuring of the loan in August 2004 at a point in time when it was clearly aware
12 of the software upgrade. Both additional failures to comply with reporting requirements
13 demonstrate that the Committee was not making "best efforts" to comply with the Act.

14 Therefore, we recommend that the Commission find probable cause to believe that
15 Texans for Henry Cuellar Congressional Campaign and Rosendo Carranco, in his official
16 capacity as treasurer, violated 2 U.S.C. § 434(b) and 11 C.F.R. § 104.3(d) by failing to timely
17 and accurately file a Schedule C-1 with its 12-Day Pre-Primary disclosure report reporting
18 information on the bank loan and by failing to timely and accurately file a Schedule C-1 with its
19 October Quarterly disclosure report including information on the bank loan restructuring.

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⁴ As discussed in the First General Counsel's Report, the software upgrade was announced to the regulated community through the regular channels. *See First General Counsel's Report* at 7 n.6.

IV. MUR 5680

A. Factual Summary

On October 21, 2004, the Committee filed a 12 Day Pre-General Report, covering the period of October 1, 2004 to October 12, 2004, and reported total disbursements of \$78,570.11. The Committee amended the report on January 12, 2005 to disclose an additional disbursement of \$100,000, increasing the total reported disbursement to \$178,570.11. The additional disbursement was paid to the Campaign Group, Inc. for media services on October 7, 2004. It represented a 127% increase in activity from the original report and 56% of the Committee's disbursements for that period.

RAD sent an "RFAI" regarding the increase in activity on March 29, 2005. The Committee missed several deadlines for responding to this RFAI. On July 7, 2005, the Committee filed a Miscellaneous Report explaining that the Committee employee responsible for the reports had overlooked the payment because it had been made by wire transfer and not a check. In the Miscellaneous Report, the Committee stated it had "caught the omission through an audit of our bank account," which took place after the general election.

B. The Committee Failed to Disclose a \$100,000 Disbursement

The Act and Commission regulations require candidate committees to file all receipts and disbursements that occurred as of the 20th day before the election in a pre-election report no later than the 12-day before the election in which a candidate is seeking election. 2 U.S.C. § 434(a)(2)(A)(i). The report shall disclose, *inter alia*, the total amount of disbursements, and an itemization of all disbursements, including operating expenditures. 2 U.S.C. § 434(b)(4)(b);

1 11 C.F.R. § 104.3(2)(b)(i). While the Committee self-corrected this reporting error, it did not
2 respond to RAD's RFAI concerning the late disclosure and missed several deadlines. The
3 Committee does not contest the fact that it failed to disclose the expenditure.

4 Therefore, we recommend that the Commission find probable cause to believe that
5 Texans for Henry Cuellar Congressional Campaign and Rosendo Carranco, in his official
6 capacity as treasurer, violated 2 U.S.C. § 434(b)(4) by failing to disclose certain disbursements.

7 **V. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

MUR 5422: General Counsel's Report # 3
MUR 5680: General Counsel's Report # 2

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9 VI. RECOMMENDATIONS

10 MUR 5422

- 11 1. Find probable cause to believe that Texans for Henry Cuellar Congressional
12 Campaign and Rosendo Carranco, in his official capacity as treasurer, violated
13 2 U.S.C. § 434(b) and 11 C.F.R. § 104.3(d).
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15 MUR 5680

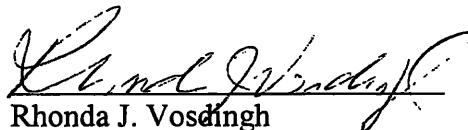
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17 1. Find probable cause to believe Texans for Henry Cuellar Congressional Campaign
18 and Rosendo Carranco, in his official capacity as treasurer, violated 2 U.S.C.
19 § 434(b)(4).
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21 MUR 5422 and 5680

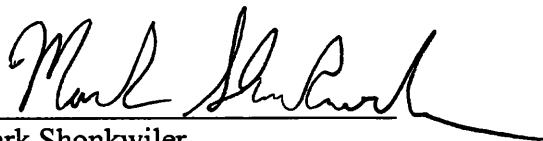
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